SUBJECT INDEX.

	PAGE
Statement of the Case	1
Argument:	
Summary	2
A. The General Accounting Office is the only agency of the government authorized by Congress to settle and adjust claims against the government and when it has acted pursuant to that authority, the settlement made by it is binding and conclusive on the executive branch of the government	2
B. The letter of the Department of the Interior did not by its own terms constitute a settlement	15
C. Reply to Petitioner's argument	23
Reply to Petitioner's Point A	24
Reply to Petitioner's Point B	25
Reply to Petitioner's Point C	27

Table of Cases Cited.

PAGE

American Bonding Co. v. Franchini, 233 Fed. 364.... 22
Anderson v. United States, 61 Ct. of Cl. 201..... 7
Arnold v. United States, 280 Fed. 338.....14, 22

Consolidated Indemnity & Insurance Co. v. Smoot, 57 Fed. (2d) 995..... 13
Cooke v. United States, 91 U. S. 389..... 10

Illinois Surety v. United States to use of Peeler, 240 U. S. 214.....13, 14, 15, 17, 24, 25
In Re Departmental Reference, 59 Ct. of Cl. 813... 7, 8

Lambert Lumber Co. v. Jones Engineering & Construction Co. (47 Fed. 2d, 74) Certiorari denied 283 U. S. 842.....5, 7, 19, 20, 21

Masses v. Patton, 246 Fed. 24..... 22
McCarl v. Miguel, 66 Fed. (2d) 564..... 7
McKee v. United States, 12 Ct. of Cl. 504.....10, 11

St. Louis, B. & M. R. Co. v. United States, 268 U. S. 169..... 11

United States v. Arnold, 268 Fed. 130..... 22
United States v. French, 52 Fed. (2d) 235..... 7
United States v. Starr, 20 Fed. (2d) 803..... 14
United States v. Lynch, 137 U. S. 280..... 11

Winnisimmet v. United States, 12 Ct. of Cl. 319..... 11

Senate Report 524, 66th Congress.....4, 5

22 Corpus Juris, 130..... 22

Table of Statutes Cited.

Act March 3, 1817, 3 Stat. at L. 366.....9, 26

Act of March 30, 1868, 15 Stat. at L. 54.....11, 9, 26

Act of July 31, 1894, 28 Stat. at L. 208.....9, 26

Budget and Accounting Act of June 10, 1921, 42 Stat. at L. 20.....1, 2, 3, 4, 5, 6, 9, 11, 13, 15, 21, 22, 23, 26, 27

"Hurd Act"—Act of August 13, 1894, 28 Stat. at L. 278, as amended by Act of February 24, 1905, 33 Stat. at L. 811.....1, 5, 6, 12, 14, 16, 24, 25, 27

STATEMENT OF THE CASE.

When the work on the government contract concerned in this case had been completed, the First Assistant Secretary of the Department of the Interior sent to the General Accounting Office a letter "enclosing herewith for direct settlement claim" of the contractor (R. 24). Subsequently the General Accounting Office issued its Certificate of Settlement (R. 28) signed by the Comptroller General who therein stated, "I certify that I have examined and settled" the claim of the contractor. Which of these two writings constitute the final settlement under the Hurd Act (Act of August 13, 1894, 28 Stat. at L. 278, as amended by Act of February 24, 1905, 33 Stat. at L. 811)? If the former letter, this suit was brought too late, but if the Comptroller General's Certificate was the final settlement, the suit was brought within the statutory period and the plaintiff (respondent herein) should recover in this suit against the surety. It is the respondent's contention that under the Budget and Accounting Act of 1921 it makes no difference what the department heads may do or say, nor how final and conclusive their language might be in attempting to make a final settlement, their efforts in that respect are utterly futile when the claim has reached and been acted upon by the General Accounting Office.

ARGUMENT.

Summary.

A. The General Accounting Office is the only agency of the government authorized by Congress to settle and

adjust claims against the government and when it has acted pursuant to that authority, the settlement made by it is binding and conclusive on the executive branch of the government.

B. The letter of the Department of the Interior did not by its own terms constitute a settlement.

C. Reply to petitioner's argument.

A. THE GENERAL ACCOUNTING OFFICE IS THE ONLY AGENCY OF THE GOVERNMENT AUTHORIZED BY CONGRESS TO SETTLE AND ADJUST CLAIMS AGAINST THE GOVERNMENT AND WHEN IT HAS ACTED PURSUANT TO THAT AUTHORITY, THE SETTLEMENT MADE BY IT IS BINDING AND CONCLUSIVE ON THE EXECUTIVE BRANCH OF THE GOVERNMENT.

Under Article I, Section 9 of the Constitution, no monies may be drawn from the Treasury except in consequence of an appropriation made by law. It must follow that Congress has power to designate the particular officers of the government who shall determine the amounts due claimants against the government and the practices of the government in regard to settlement of claims and accounting procedure, and the courts have always acknowledged the right of Congress so to do.

The Budget and Accounting Act of 1921 (42 Stat. at L. 20) reads in part as follows:

> "All claims and demands whatever by the Government of the United States or against it . . . shall be settled and adjusted in the General Accounting Office." Sec. 305.
>
> "all powers and duties now conferred or imposed by law upon the comptroller of the Treasury or the

six auditors of the Treasury Department . . . shall, so far as not inconsistent with this Act be vested in and imposed upon the General Accounting Office and exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government." Sec. 304.

"Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. The Secretary of the Treasury shall make regulations fixing the time of payment which shall expire before a warrant be issued in payment of an amount certified as provided in this section." * * *

"Disbursing Officers, or the head of any executive department, . . . may apply for and the General Accounting Office shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern such office in passing upon the account containing said disbursement." 31 U. S. C. A. 74.

The Act also provides that at the head of the General Accounting Office there shall be the Comptroller General who shall be appointed by the President, subject to the approval of Congress, that his term of office shall be fifteen years and that he may not be removed from office except by Congress. With these particular provisions in mind it can easily be seen that it was the purpose of Congress to establish an agency of the government entirely independent from other executive departments and to provide for an entirely new system for the settlement of government accounts and all claims by and against the government. It seems equally clear that the position of the General Accounting Office in government affairs is

unique in that it is accountable only to Congress and not to any other branch of the government.

The court should in enforcing the Act give it that interpretation which will best carry out the purpose of Congress. In urging adoption of the Act a committee of the Senate reported as follows:

> "The Government has become notorious for lack of uniformity in its accounting methods. Administrative accounting procedures in the departments, are practically speaking, left to the ingenuity of individual employees, and as a result each bureau and office now keeps its books in accordance with its own peculiar ideas. Federal disbursing and collecting officers in the District of Columbia and throughout the United States are largely permitted to keep their local records to suit their own tastes and notions of system and procedure. Such small uniformity as may be found in these offices has been brought about by regulations emanating from the heads of the several departments and establishments. Only in the manner and form of accounting to the auditors of the Treasury is there a semblance of accounting uniformity and regularity."
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> * * * * * * * *
>
> "With respect to the administrative examination it would be fair to say that as many systems and plans of auditing the accounts of disbursing and collecting officers and claims against the United States are in vogue today as there are separate agencies of governments. In some cases the administrative examination is a complete and full examination; in some cases it is woefully inadequate; and in other cases it exists in name only.
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> * * * * * * * *

"This office will receive, audit, and settle the account of all disbursing and collecting offices of the Government and all claims against the United States. He will perform generally the duties now intrusted to the auditors for the various departments . . ."

(Senate Report 524, 66th Congress on amended H. R. 9783.)

Judge Kenyon, who wrote the opinion in the case of Lambert Lumber Company vs. Jones Engineering and Construction Co. (47 Fed. 2nd, 74), which will be referred to later herein, was a member of the Senate at the time this legislation was considered and was well qualified to judge the necessity for such an Act. In the case cited he states (page 80) referring to the disbursement of public funds prior to 1921:

"Even with this Accounting System in the Treasury Department passing on claims and determining amounts due from the government, the waste of public money and the scandals arising from payments on government contracts had so challenged the attention of Congress and the country that there was agitation for the creation of a budget system and to put a stronger check on government expenditures by a strengthening of the accounting system."

Counsel for the petitioner has argued that there was little that was new in the Act of 1921 in as much as previous legislation had reposed similar authority in the Treasury Department. However that may be, the plain words of the Act, the report of the Senate committee and the observations of Judge Kenyon show that Congress felt that regardless of what might have been the law previous thereto, that a change was necessary and that Congress was determined to separate from the spending and dis-

bursing agencies of the government the authority to settle and determine the amounts due upon claims both by and against the government. The Comptroller General, therefore, becomes the watch dog of the Treasury and separated as far as is practically possible from the influences which had theretofore interfered with the work of the various executive offices of the government, there has been committed to his charge the sole authority to determine whether payments from the Treasury are authorized by Congress.

Congress has not authorized any other department or agency of the government to settle and adjust claims and accounts. If there were in force some other Act which could be interpreted as conferring upon the various departments the right to settle their own contracts, then indeed there would be a conflict and it would be necessary for this court to declare the will of Congress as to this particular state of facts, but in the absence of any such enactment, the Act of 1921 stands alone and must be given the full force and effect intended for it by Congress.

It is the contention of the petitioner that the contract in this case was settled by reason of the letter of the First Assistant Secretary of the Interior (R. 24), but we have searched in vain for any legislative authority in the Department of the Interior to settle its own contracts. Respondent does not contend, however, that the lack of legislative authority prevents the Department of the Interior from making settlement under the Hurd Act where there has been no action by the Comptroller General, but we do contend that where the Comptroller General has settled a contract in pursuance to the authority conferred upon him by Congress that his action in that regard is final and conclusive upon all executive branches of the government. Strictly speaking the Department of the Interior has no "authority" in the proper sense of that word. Whatever right it may have to settle government con-

tracts has been accorded to it by the courts in cases where the General Accounting Office has never had submitted to it the contract in question. In other words the courts have always recognized, where a settlement is made by an executive department and where there has been no action by the office authorized by Congress to settle such a contract, that the finding of the department is the final settlement; but where that office, which has been duly authorized by Congress to make such settlement, settles a claim against the government, the action of such office is the final settlement of the contract and it is superior in effect to the action of any other executive official. To hold otherwise would negative the will of Congress and this thus far no court has done.

In every case in which there was action by the General Accounting Office the courts have held its decision to be conclusive on the executive branch of the government.

Lambert Lumber Co. vs. Jones Engineering, 47 Fed. (2d) 74;
United States vs. French, 52 Fed. (2d) 235;
McCarl vs. Miguel, 66 Fed. (2d) 564;
In Re Departmental Reference, 59 Ct. of Cl. 813;
Anderson v. U. S., 61 Ct. of Cl. 201;
McKnight vs. United States, 13 Ct. of Cl. 292, 307.

In his opinion in the Lambert case (supra) Judge Kenyon states, page 85:

> "We hold the final settlement here was made by the Comptroller General when he certified on April 2, 1925, that he had 'examined and settled the claim of Jones Engineering and Construction Co. for final payment,' and not by the Bureau of Yards and Docks or the Director of the Veterans' Bureau."

Chief Justice Taft in his book "Our Chief Magistrate and His Powers", page 81, writes:

"Then consider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury (now the Comptroller General). It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. . . . His work is like the work I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may in some cases carry his claim into the Court of Claims, but if he decides for the claimant, the public and those interested in maintaining the side of the Government have no appeal, and his decision is final."

And the Court of Claims In Re Departmental Reference, 59 Ct. of Cl. 813, stated:

"The disallowance of part of the claim of Hubert C. Anderson was reviewed by the Comptroller General of the United States at the request of the Treasury Department, and the settlement was sustained by his decision rendered December 8th, 1923. This ruling is conclusive upon the executive branch of the government by virtue of the Dockery Act of 1894 and the Act of June 10th, 1921, 42 Stat. at L. 24. There being no authority after this decision by the Comptroller General for the Treasury Department to settle or pay the claim it can not be transmitted by the Secretary (to the Court of Claims) under Section 148."

Respondent bases its case upon the authority granted to the General Accounting Office by the Act of 1921, but the legislation and the cases prior to that Act have some bearing on the question before us and should be considered.

As early as 1817 Congress enacted legislation providing in part as follows:

> "All claims and demands whatever by the United States or against them . . . shall be settled and adjusted in the Treasury Department."

Subsequently, on March 30th, 1868, (15 Stat. at L. 54) Congress amended the Act of 1817 to read that heads of departments may not change balances certified to them by the Comptroller of the Treasury, but such balances so certified shall be final and conclusive on the executive branch of the government,

> "Provided, that the head of the proper department, before signing a warrant for any balance certified to him by a Comptroller, may submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive as hereinbefore provided."

Similar restrictions on the authority of the various departments and similar authority to the Treasury Department were provided for by the Act of July 31st, 1894 (28 Stat. at L. 208).

It will, therefore, plainly be seen that it was the policy of Congress to grant to the Treasury Department (the predecessor of the General Accounting Office) the right to determine the amount due on claims against the government and on government contracts. Here again, the courts have recognized the purpose of Congress to repose the final authority for the settlement of claims in

a single independent agency and have *in every case,* where the Treasury Department made its decision as to the amount due on the claim, found that such decision was final and conclusive on the executive branch of the government.

Chief Justice Waite in Cooke vs. United States, 91 U. S. 389, 399, stated:

> "Thus it is seen that all claims against the United States are to be settled and adjusted 'in the Treasury Department;' and that is located 'at the seat of government.' The assistant-treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority to settle and adjust, that is to say, to determine upon the validity of, any claim against the government. He can pay only after the adjustment has been made 'in the Treasury Department,' and then upon drafts drawn for the purpose by the treasurer."

In McKee vs. United States, 12 Ct. of Cl. 504, 532, the court stated:

> "The Comptrollers of the Treasury are neither contracting nor disbursing officers. Within the proper functions of their offices they are above the review of the highest executive authority, and their decisions are subject to only judicial revision. Substantially all accounts must pass under their eye and receive their approval. . . . But the business of the Comptrollers is to determine what payments shall or shall not be made on behalf of the United States. These functions of office were a part of the wondrous birth of the Treasury system, and have remained unchanged from the foundation of the Government to the present time.

The only statute which has been passed since the First Comptroller's office was established is declaratory and mandatory as to their powers. (Act 30th March, 1868, 15 Stat. L., 54."

"Because of limitations imposed upon the powers of disbursing officers, it is often desirable to present the claim for direct settlement to the auditor for the department, who is an accounting officer of the Treasury. The auditor may allow the claim in whole or in part. If his action is not satisfactory, either to the claimant or to the head of the department affected, an appeal may be taken to the Comptroller of the Treasury for its revision. In the absence of an appeal, the settlement of the auditor is 'final and conclusive upon the executive branch of the government.'"

St. Louis, B. & M. R. Co. vs. United States, 268 U. S. 169, 174.

See also:

Winnisimmet vs. United States, 12 Ct. of Cl. 319; United States vs. Lynch, 137 U. S. 280.

Consequently, both before and after the Act of 1921, the courts have uniformly held that settlements made by the General Accounting Office or by the Treasury (as the case might be) were the "final settlements" and that the action of other administrative officers were of no effect and were not binding on the government.

The cases thus far considered are those in which the General Accounting Office (or its predecessor the Treasury Department) had passed upon a claim. The courts, as we have shown, have consistently treated such action as the final and conclusive settlement regardless of what other departments of the government may have done. There is a long line of cases, however, in which it appears that no submission of the claim had ever been made to the General Accounting Office, or to the Treasury Department. It is upon those cases that petitioner relies. It should be perfectly obvious that such cases have no bearing on the case now before the court. We do not claim that the General Accounting Office alone can make a final settlement, but we claim that where it has acted its decision is controlling. Consequently all those cases cited by the petitioner where there was no action by the General Accounting Office are beside the point and the opinions therein contained could at most be only dicta. As a matter of fact in only one of the score or more of cases cited by the petitioner was the court called upon to make any decision as to the right or authority of one officer or another to make a final settlement. Manifestly, since those courts were never called upon to weigh the respective authorities of two offices, it is difficult to see how their opinions could in any respect be applicable to this case.

Congress has authorized the General Accounting Office to make final settlement and where a claim is never even submitted to that Office and where some Department officer has assumed the right to make a settlement the courts have naturally recognized that settlement as the final settlement of the contract under the Hurd Act. To hold otherwise would mean that many claimants would never get their money. Whatever standing such settlements have in the eyes of the law is given to them by the courts and not by Congress. Petitioner has endeavored to apply to this case, where a settlement was made by the officer

specifically empowered by Congress to perform that duty, a principle of law drawn from cases where there was no action of any kind by the General Accounting Office or by the Treasury.

Moreover, in only one of the cases relied upon by the appellant was the court called upon to make a decision as to the relative authority of the Comptroller General and another government officer and that was in the case of Consolidated Indemnity and Insurance Company vs. Smoot, 57 Fed. (2d) 995. In that case the War Department not only determined the amount due under the contract, but paid out the money and there was no submission of the matter to the General Accounting Office at any time whatsoever. The surety naturally raised the point that the suit had been brought too soon for the reason that under the Act of 1921 there had been no submission of the claim to the General Accounting Office. The court properly held that in the absence of a submission of the matter to the General Accounting Office the settlement by the War Department was final. Any other decision would have been ridiculous. The court could not seriously say that there had not been final settlement of the contract by the government when the money had actually been paid to the contractor.

In all the other cases relied upon by the petitioner, a great many of which are cited on pages 26, 27 and 28 of its brief, not only was there no action by the General Accounting Office or by the Treasury Department, but the question of the right of the department officer to make the final settlement was never questioned and it was, therefore, unnecessary for the courts to decide any such question. Those cases almost without exception arose over a dispute as to *what* was final settlement. For instance in Illinois Surety Company vs. United States to the use of Peeler, 240 U. S. 214, which appears to have been a leading case, the question before the court was

whether or not payment was a prerequisite to final settlement. It was held that payment was not necessary and final settlement under the Hurd Act was defined as the determination by the proper government official of the amount which the United States was entitled to receive or obligated to pay. There was no discussion in the case whatsoever as to who was the proper officer to make such a determination and the courts which have followed the Peeler case have likewise not had before them the necessity for determining who that official was. As in the Peeler case a number of these cases have arisen due to the dispute as to whether payment was final settlement. In other cases the government had prepared a final statement of the figures showing that it had retained a certain percentage of the contract price to cover possible future claims or damages (United States vs. Starr, 20 Fed. 2d, 803), and in still other cases a small balance had been held open pending the receipt of some formal approval as to that item (Arnold vs. United States, 280 Fed. 338).

However, the petitioner has used frequent quotations from these cases to show that various department heads were authorized to settle contracts, ignoring completely that the question of the authority of the various officials was never raised by the litigants or considered by the court. It is true that the settlements in those cases were made by the officers in charge of the construction work. However, not one of the courts which wrote those opinions either expressly or impliedly based its decision upon that fact and there is no authority whatsoever, either judicial or legislative, for the proposition that the department having charge of the work is the department to settle the contract. As stated before, the cases relied upon by the petitioner all turn upon what is, and not who makes, a final settlement. The value of such cases for our purpose only lies in their interpretation of the meaning of the words "final settlement". In that respect they follow the

Peeler case and define "final settlement" to mean the administrative, as distinguished from judicial, determination of the amount which the government is finally found to pay, and as Congress has directed that the determination of that figure shall be made by the General Accounting Office, we submit that the action of that Office in determining the amount due is the final settlement as those words are defined by the Peeler case and all of the other cases which follow it.

It is, therefore, our position that the Certificate of the General Accounting Office was the determination of the amount due the contractor and in that respect complied with the requirements of the Peeler case and the other numerous decisions defining a final settlement. Furthermore the Certificate of Settlement was issued by the very officer charged by law with that duty, and under the Act of 1921, when the Comptroller General makes such a settlement, other departments are powerless to overrule him and their actions in that respect are void. We submit that it makes no difference what the Secretary of the Interior may have written, nor how positive nor how final the language he may have used, for when the Comptroller General passes upon the claim, his decision is the only settlement made by the government.

B. THE LETTER OF THE DEPARTMENT OF THE INTERIOR DID NOT BY ITS OWN TERMS CONSTITUTE A SETTLEMENT.

The attention of the court is called to the two writings appearing on page 24 and page 28 of the record. The first, which petitioner claims was the final settlement, is a letter from the First Assistant Secretary of the Department of the Interior addressed to Claims Division, General Accounting Office. It begins "I am enclosing herewith for direct settlement the claim of the Sanitation

Corporation" and concludes, "the claim has received administrative examination, is approved for $8899.30, and I recommend that the amount found due be paid from the reclamation fund—4 X 502". In the body of the letter he has set forth in detail how that balance was arrived at and states that he is enclosing certain correspondence relative to the delay "for your consideration". Then follows a list of some seventy-four documents relating to the claim.

Subsequently the General Accounting Office issued its "Certificate of Settlement" (p. 28 Record) signed by the Comptroller General. It begins, "I certify that I have examined and settled the claim(s) of the Sanitation Corporation . . . and find that the sum of Eight thousand eight hundred ninety-nine Dollars and Thirty Cents is due from the United States to said claimant(s), payable from the appropriation(s) 4X502. . . ." and concludes, for the reasons stated, "it must be concluded that the claimant company is liable to the United States for liquidated damages for one hundred sixty three days' delay at Twenty-five Dollars per day. Issue warrant(s) and send same as above." The Comptroller General likewise reviews the reasons for certain deductions and in making his finding relies upon the correspondence submitted by the Interior Department.

The whole question at issue here is which of these letters constituted the final settlement as intended by the Hurd Act. It is admitted that one of them was a final settlement. It is the respondent's contention that the first letter simply submitted the claim to the General Accounting Office so that that office could make the final settlement. The claim was enclosed "for direct settlement". There was also enclosed certain correspondence "for your consideration" and payment was "recommended". On the other hand the Comptroller General specifically certifies that he has settled the claim and that he finds a definite

sum to be due by the government and he concludes that the contractor is liable for damages for delay in completion. It will be noticed at once that the language which the Interior Department has used is not final or conclusive upon the government. The writer has simply approved and recommended. On the other hand the certificate of the General Accounting Office uses words of finality. The matter is closed.

The Secretary's letter states (R. 24) "The contractor has filed written application for extension of time . . ." If the writer felt he had settled the claim, would he have not also stated that the application had been refused? So far as the letter shows, no action was taken on this application.

Our opponents have argued that the use of the word "approved" (R. 28) makes the letter a final settlement. This cannot be. One "approves" the "act" of another. Approval itself is not an act, whereas a settlement must be something done. Settlement is defined in the dictionary as "the act or state of being settled." Approval is "approbation or ratification".

Furthermore, it is only natural that the Interior Department, having examined a claim, should give the claim its approval or disapproval. The Department would not recommend payment of a claim it disapproved.

The trial court as well as the petitioner has relied upon general statements of the law found in the Peeler case which have been widely quoted, that final settlement occurred "when, so far as the government was concerned, the amount which it was *finally* bound to pay, or entitled to receive was *fixed* administratively by the proper authority", and again, that final settlement is an "appropriate administrative *determination* with respect to the amount due". As shown hereafter, that case was entirely different on its facts from the present one, but if those statements be accepted as authoritative, the letter of the In-

terior Department does not become a final settlement for the reason that it lacks the finality and conclusiveness required by the above quotations and indicated by the words in italics (which our ours). The one quotation requires that the amount due be "fixed"; the other quotation states that the final settlement shall be a "determination" of the amount due. It does not need a dictionary to convince the court that these two words are words of finality and conclusiveness and if the Secretary of the Interior intended that his letter should fix or determine the amount that was due in the sense that he was concluding or binding the government, then he should be expected to use in his letter some words of finality, conclusiveness, or determination. The court will search in vain through that letter for any words or any indication that the Secretary of the Interior had any intention whatsoever of *binding* the government to the payment of the amount which he approved.

Even if it be assumed that he was the authorized government official to make such a finding, the mere fact that he has made a mathematical calculation is not of itself any indication whatsoever that he has intended such a calculation to be binding on the government. It is not only necessary that the official have the authority, but that he *exercise* it. On the other hand the language which he has used not only fails as an assertion of authority, but is clearly a submission of the matter to another authority. He encloses for direct settlement, he recommends that payment be made, and he forwards correspondence for the Comptroller General's consideration.

If it be assumed that he had intended a final settlement and an administrative determination of the amount due, why should he submit to the Comptroller General seventy-four letters and reports relative to the matter, why should he explain with such care how the amount was arrived at and the reason for the deductions which he

recommends, and why did he not find as a fact that the amount stated was the amount which the government should pay?

A situation almost identical with that in the present case is found in the case of Lambert Co. vs. Jones Engineering and Construction Co., 47 Fed. (2d) 74 (Certiorari denied 283 U. S. 842). The opinion was by Judge Kenyon.

In that case the Veterans' Bureau sent a letter to the General Accounting Office reading in part as follows:

> "Examined in the sum of $10,975.39 and respectfully referred to the General Accounting Office for examination, settlement, and approve for payment in the amount found due to Jones Engineering and Construction Company, Inc. a/c Chief Bureau of Yards and Docks, Navy Department, Wash., D. C., from the appropriations stated below . . ."

There was included in this letter a statement of how that amount was arrived at, together with the correspondence and documents relating to the claim. After receipt of the letter, the Comptroller General of the General Accounting Office certified that he had "examined and settled the claim of Jones Engineering and Construction Company for final payment". This certificate appears to have been upon a form used by the General Accounting Office identical with the one in evidence in the present case, and the letter of the Veterans' Bureau is practically the same as the letter of the Interior Department in the present case. Although both petitioner and the trial court state there is a difference between the two letters, neither has pointed out any respect in which they differ. From the standpoint of ordinary grammar, both letters fail to show any intention on the part of the writer to *settle* anything or to make any *final* finding but both pass on that duty to the General Accounting Office.

Judge Kenyon was of the same opinion for he states (p. 78),

> "If it had been intended that the action of the Veterans' Bureau and the Bureau of Yards and Docks of the Navy Department should be a final settlement, there would have been no need of any such a letter as is set forth in finding 10. It would merely have asked for approval of the voucher."

and (p. 81),

> "We do not see how, in view of the history of the accounting system of the government, and especially in view of section 71, 31 USCA, it can be claimed that the Comptroller General of the United States would have no authority to settle the matters arising under the contract involved in this case when requested so to do by the heads of departments having charge of the work.
>
> "What was the use of asking the Comptroller General to make direct settlement of this claim if he had no authority so to do, or if it had already been settled? Why did the Veterans' Bureau use the term 'examined' instead of 'settled' if it understood a final settlement had been made? The Chief of the Bureau of Yards and Docks had made an 'administrative examination,' not an 'administrative settlement.' There could not be two final settlements. How can there be a final settlement when some other power has authority to turn it over and make another one? Section 74, c. 2, title 31, USCA, provides:
>
> > 'Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.'
>
> "If the claimed settlements of the heads of

> bureaus are final, then why are they not final as to the Comptroller General? How can a court say that, although under the act there is general power in the Comptroller General to make settlements, to reopen matters and obtain further evidence necessary to a settlement, the 'final settlement' under section 270 (40 U S C A) is an entirely different thing, with which he had nothing to do? Congress has not said so."

Although Judge Kenyon limited his actual decision to the facts of the case before him, it is equally true that had it been necessary to do so, he would unquestionably have found that the General Accounting Office made the settlement, regardless of what the forwarding office may have done. His whole argument and his determination to give effect to the Act of 1921 would require such a conclusion.

In arriving at his decision, Judge Kenyon considered and cast aside as obsolete or irrelevant the same line of cases relied upon by the petitioner. Substantially, the same arguments were made in that case as petitioner now offers, and with the facts alike, it is difficult to see how there can be any different decision.

This Court gave a certain approval to Judge Kenyon's opinion when it refused a certiorari (283 U. S. 842).

We submit that the letter of the First Assistant Secretary of the Interior (in our own case) is not by its own terms a final settlement as it submits the claim to another authority for "final settlement" and does not in any way show the *intention* of the writer to *settle, determine* or *fix finally* the amount due by the government. It left the *final* decision to the General Accounting Office.

There is a legal presumption that public officers have complied with the law.

Masses vs. Patton, 246 Fed. 24;
22 Corpus Juris, 130.

Can it not be assumed that the Secretary of the Interior wrote his letter with the Act of 1921 in mind and in compliance with the requirement therein that the General Accounting Office should settle the claim? Any doubt as to the Secretary's intention should certainly be resolved in favor of appellee.

On pages 32 and 33 of the Record are printed two letters, one by attorneys for the subcontractor, and a reply thereto by the General Accounting Office. The attorneys request the date when final settlement was made and in response to that inquiry the General Accounting Office states "you are advised that the final payment was made November 5, 1927". Counsel submits that the attorneys had a perfect right to rely upon the information given by the General Accounting Office. If claimants cannot rely upon the statements made by government officers and if they are put to the duty of examining and interpretating all of the official correspondence and documents hopeless confusion will be the only result. Although the General Accounting Office has used the term "final payment" it is used in response to the attorneys' inquiry and counsel were entitled to rely upon the information thereby given.

American Bonding Co. vs. Franchini, 233 Fed. 364;
United States vs. Arnold, 268 Fed. 130;
Arnold vs. United States, 280 Fed. 338.

C. REPLY TO PETITIONER'S ARGUMENT.

Summarized, the argument of our opponents is (1) subcontractors should not be required to wait even the short additional time for a settlement by the General Accounting Office, (2) the department in charge of the work should finally determine the amount due by or to the government, and (3) if such department does make a settlement, it is final and conclusive on the General Accounting Office.

Such an argument might well be addressed to Congress, but not to a court, for it is not based on any statute or judicial opinion. As previously stated, no court has yet stated that the fact a department has charge of construction work entitled it to make final settlement of the contract. The cases cited by petitioner show that settlements have been made by departments only in the absence of action by the Treasury Department or by the General Accounting Office.

Furthermore, as to engineering details, the General Accounting Office is entitled to a preliminary examination and report by the construction officers. Congress so provided in the Act of 1921, realizing of course that the General Accounting Office could not, without the assistance of the other executive branches of the government, come to any intelligent decision.

For over a hundred years Congress has consistently made clear its purpose that the amount due on a contract or a claim shall not be determined by the contracting officers, but shall be left to the judgment of an independent authority. Never during that long period has it altered its stand. It has, on the contrary, sought better methods of attaining that end and on a number of occasions enacted new laws, each one strengthening and increasing the authority of the Treasury, and finally created the General Accounting Office.

The advantages and disadvantages of having the contracting officers settle contracts have no doubt been argued

out on the floor of Congress and in committee many times, but Congress has declared its preference and having done so, the question is no longer arguable. Claims against the United States shall be settled and adjusted in the General Accounting Office and its decision shall be final and conclusive. Of what use then to argue the advantages of settlements by contracting officers?

Reply to Petitioner's Point A.

The phrase "engineering settlement" has been coined by petitioner and is not used in any case. In the Peeler case, to which so much space has been given, the only question before the Court was whether actual payment of a claim or merely a determination of the amount due constituted final settlement. The Court held that payment was not a settlement under the Hurd Act but that when the amount which the government "was finally bound to pay or entitled to receive was fixed administratively by the proper authority" there was a final settlement. That amount which the government "was finally bound to pay" is the very amount which Congress has declared shall be determined by the General Accounting Office which it declares to be "the proper authority" for so doing.

The word "administratively" in the definition of final settlement is evidently used in contradistinction to "judicial", for immediately following the first quotation appearing on page 10 (petitioner's brief) the court stated:

> "As an administrative matter, it does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does

not affect the running of the time for bringing action under the statutory provision." (p. 221)

The General Accounting Office is an administrative office.

In the Peeler case the construction work was in charge of the Secretary of the Treasury, and in the early part of its opinion the court comments in some detail upon the fact that under legislation then in force all claims against the United States were to be settled in the Treasury Department. Except for its definition of the term "final settlement", the Peeler case is of no use in our case, where the question is, who is the proper authority to settle and not, what is a settlement.

The numerous cases cited on pages 12 and 13 of petitioner's brief follow the Peeler case. In all of them, the dispute was whether or not the amount due by the government had been finally determined, not whether the proper authority had made the calculation. In fact, few if any of these cases gave any consideration whatever to the authority of the settling officer to act. That question was not before the courts for determination.

The long quotation on page 14 et seq. is from a case which determined that suit under the Hurd Act might be brought six months after completion of the work to the substantial satisfaction of the government and need not be deferred until six months after complete satisfaction and actual completion of the work. Here too, there was no need for a decision, and the court did not pass upon, the authority of the officer to settle the contract. Questions not raised by litigants need not be considered by the court.

Reply to Petitioner's Point B.

Our opponents are in error in stating (page 17) that the court below held that the date of final settlement cannot be fixed by the department in charge of the work and must be fixed exclusively by the General Accounting Office. The

court did say that the certificate of the General Accounting Office was the final settlement. It gives no indication whatsoever of what its opinion would be in a case where there was no reference of the matter to that Office.

On page 19 petitioner argues that the General Accounting Office is not in a position to judge the quality or completeness of work performed for the government. Neither is the Secretary of the Interior. He depends on his subordinates and the Comptroller General can require the same proofs before making a settlement.

Petitioner argues the Act of 1921 is not new law. As previously shown (page 10 this brief), every court that had occasion to consider the respective authorities of the Treasury Department under legislation prior to 1921 and other departments found the actions of the Treasury Department in settling claims to be the action of the government, and binding and conclusive on other departments of the government. Petitioner should show that previous to 1921 the courts interpreted the Act of 1817, 1868 and 1894 as conferring no authority on the Treasury Department to make settlements, but this it cannot do. There are no such cases.

Furthermore, the mere adoption of the Act of 1921 reaffirms the determination of Congress to separate in different agencies the right to contract and build for the government and the authority to settle the amounts due the various claimants for the work contracted for. The establishment of the General Accounting Office with its augmented powers and its complete independence from all other executive branches of the government clearly manifests that purpose.

The cases cited by petitioner on pages 26, 27 and 28 are not in point for the reasons previously asserted: (1) The courts did not examine the authority of the settling officer, and (2) they had no occasion to do so. The litigants did not request it. In all the quotations given by appellant,

there is not a single attempt to trace, determine, explain, or otherwise examine the authority of the settling officer. It was on account of the unsatisfactory manner in which these "engineering settlements" had been made, that the Act of 1921 was made into law.

It is true that subcontractors will be slightly delayed by having to wait for settlements by the General Accounting Office, but that disadvantage will be more than compensated for by the certainty of the Comptroller General's certificate of settlement. In those cases where the claim was not sent to the General Accounting Office or to the Treasury Department, it appears that settlements have been made not only by Department heads, but by chief engineers, architects, constructing quartermasters, bureau chiefs and almost every petty official in the government. It is a mystery how a subcontractor could tell who to go to, or how he could learn when his contract had been settled, and this uncertainty has caused many a claimant the loss of all benefit of the Hurd Act.

Reply to Petitioner's Point C.

This part of petitioner's argument is an attempt to show that the language used by the Secretary of the Interior is sufficiently conclusive to constitute a final settlement. It is stated that the language of letters quoted from other cases is no more final than the language of the Secretary's letters. The Mandel case is quoted (page 35), but it will be noticed that the writer of that letter "approved" the "findings" of another body and thereby adopted as his own such findings. He did not merely *approve* a certain sum as being due by the government, but approved the *finding* of another authority that a certain sum was actually due. Also the letter in the Mandel case does not show any submission of the matter to another authority which is shown in the letter in our case.

To constitute a settlement we submit that the officer find as a fact that a certain sum is owing by the government. In our present case, the First Assistant Secretary examined the claim, calculates the amount and recommends that payment be made. He fails utterly to state as a fact that the government owes the contractor that amount of money, but does submit the claim to the General Accounting Office "for direct settlement". Interpretation of this letter has been fully discussed on pages 15 et seq.

We submit that not only was the Secretary's letter insufficient to constitute a settlement, but that regardless of its interpretation the Certificate of Settlement issued by the General Accounting Office was the final settlement of the contract; and that the suit was brought in proper time and the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

SAMUEL W. COOPER,
650 Real Estate Trust Bldg.,
Philadelphia, Pa.,
Attorney for Respondent.

RUSSELL C. GOURLEY,
Of Counsel.